

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Appeal of the Invasive  
Species/Infested Waters Civil Citation  
Issued to Darren James Tombers  
Citation No. 172327

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND RECOMMENDATION**

This matter came before Administrative Law Judge Amy J. Chantry for a Prehearing Conference on October 2, 2013, pursuant to a Notice of Prehearing Conference and Notice of Hearing that was issued on September 6, 2013.

Conservation Officer Jackie Glaser appeared on behalf of the Minnesota Department of Natural Resources (DNR). William Henney, Attorney at Law, appeared on behalf of Darren James Tombers (Tombers).

During the Prehearing Conference on October 2, 2013, the parties agreed to conduct a formal hearing on the citation. Sworn testimony was taken at the hearing. The parties agreed that the Administrative Law Judge could make a recommendation based on the record created during the hearing. The record closed at the conclusion of the hearing.

**STATEMENT OF THE ISSUE**

Was Mr. Tombers properly issued a civil citation under Minn. Stat. § 84D.13, for transporting Zebra Mussels?

**SUMMARY OF RECOMMENDATION**

The Administrative Law Judge concludes that Mr. Tombers committed a violation of Minn. Stat. § 84D.13. Therefore, the Administrative Law Judge respectfully recommends that the Commissioner **AFFIRM** the citation and fine.

Based on the proceedings herein, the Administrative Law Judge makes the following:

## FINDINGS OF FACT

1. During the fall of 2012, Mr. Tombers removed a community member's boat lift from Lake Minnetonka. After removing the boat lift, Mr. Tombers attempted to clean the boat lift.<sup>1</sup>

2. Mr. Tombers transported the boat lift to a residence so that it could be stored for the winter.<sup>2</sup>

3. On May 22, 2013, Mr. Tombers transported the boat lift back to Lake Minnetonka.<sup>3</sup>

4. On May 22, 2013, Conservation Officer Jackie Glaser received a call about a boat lift that was covered in Zebra Mussels at the Lake Minnetonka Regional Park.<sup>4</sup>

5. Conservation Officer Glaser went to Lake Minnetonka Regional Park to investigate the call.<sup>5</sup>

6. Upon her arrival, Conservation Officer Glaser observed the boat lift on a trailer. The trailer did not have any registration.<sup>6</sup>

7. The boat lift was covered in Zebra Mussels.<sup>7</sup>

8. Conservation Officer Glaser made contact with Mr. Tombers, who admitted that he was responsible for the boat lift.<sup>8</sup>

9. Mr. Tombers did not dispute that he transported Zebra Mussels on May 22, 2013.<sup>9</sup>

10. Based upon her observations, Conservation Officer Glaser issued Mr. Tombers a Civil Citation, No. 172327, for transporting Zebra Mussels. The penalty imposed was a \$500 fine.<sup>10</sup>

11. Mr. Tombers timely appealed the citation and requested that it be withdrawn.<sup>11</sup>

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<sup>1</sup> Testimony of Darren Tombers.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Test. of Jackie Glaser.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Test. of D. Tombers.

<sup>10</sup> Civil Citation No. 172327 on file and of record in this matter.

<sup>11</sup> See Letter from Mr. Tombers to the Commissioner of Natural Resources sent August 23, 2013, on file and of record in this matter.

Based on the Findings of Fact, the Administrative Law Judge makes the following:

### **CONCLUSIONS OF LAW**

1. This matter is properly before the Administrative Law Judge and the Commissioner of Natural Resources pursuant to Minn. Stat. §§ 14.50 and 116.072, subd. 6.

2. Minn. Stat. § 84D.05, subd. 1, prohibits persons from transporting or introducing a prohibited invasive species.

3. DNR Conservation Officers are authorized to issue citations to persons who unlawfully transport a prohibited invasive species in violation of Minn. Stat. § 84D.13, subd. 5(3).<sup>12</sup> Effective July 1, 2012, a \$500 fine may be imposed for each violation.

4. Pursuant to Minn. Stat. § 84D.13, subd. 8, an appeal of a civil citation shall be brought under the procedures set forth in Minn. Stat. § 116.072, subd. 6, provided that a hearing is requested within 15 days after receipt of the citation.

5. Mr. Tombers filed a timely appeal and request for hearing.

6. At a hearing on a violation of Minn. Stat. 84D, the burden is on the DNR to show by a preponderance of the evidence that Mr. Tombers violated the statute cited.<sup>13</sup>

7. The DNR has established, by a preponderance of the evidence, that Mr. Tombers violated Minn. Stat. § 84D.13, subd. 5(3), by transporting Zebra Mussels.

8. For purposes of Minn. Stat. § 116.072, subd. 6(d), Mr. Tomber's request for a hearing was not solely for purposes of delay and was not frivolous.

9. The attached Memorandum provides further explanation of the reasons for these Conclusions and is incorporated herein.

Based on the Conclusions of Law, and for the reasons set forth in the Memorandum below, the Administrative Law Judge makes the following:

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<sup>12</sup> Minn. Stat. § 84.13.

<sup>13</sup> Minn. R. 1400.7300, subp. 5.

## RECOMMENDATION

The Administrative Law Judge recommends that Invasive Species/Infested Waters Civil Citation No. 172327 issued to Darren James Tombers be **AFFIRMED**.

Dated: January 3, 2014

s/Amy J. Chantry  
AMY J. CHANTRY  
Administrative Law Judge

## NOTICE

Pursuant to Minn. Stat. § 116.072, subd. 6(e), the Commissioner may not issue a final order until at least five days after receipt of the Report of the Administrative Law Judge. The persons to whom the order is issued may within those five days comment to the Commissioner and the Commissioner will consider the comments. The final order of the Commissioner may be appealed, pursuant to Minn. Stat. §§ 14.63 and 14.69.

## MEMORANDUM

In an appeal of a DNR citation, the burden of proof is on the DNR to prove by a preponderance of the evidence that a violation of law occurred.<sup>14</sup> A preponderance of the evidence means that it must be established by a greater weight of the evidence.<sup>15</sup> “It must be of a greater or more convincing effect and ... lead you to believe that it is more likely that the claim...is true than...not true.”<sup>16</sup> The preponderance of the evidence standard is less than the clear and convincing standard, and less than the proof beyond a reasonable doubt standard used in criminal trials.<sup>17</sup>

Mr. Tombers asserts that he should not be required to pay a \$500 fine in this case because he tried to clean the boat lift after he removed it from Lake Minnetonka in the fall of 2012. Mr. Tombers also maintains that the Zebra Mussels that Conservation Officer Glaser observed on the boat lift were dead, and that he was going to be returning the boat lift to Lake Minnetonka, which is the same lake from which the boat lift was removed.

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<sup>14</sup> Minn. R. 1400.7300, subp. 5.

<sup>15</sup> 4 Minnesota Practice, CIV JIG 14.15.

<sup>16</sup> *State v. Wahlberg*, 296 N.W.2d 408, 418 (Minn. 1980).

<sup>17</sup> *State v. Shamp*, 422 N.W.2d 520, 525 (Minn. Ct. App. 1988), *citing Weber v. Anderson*, 269 N.W.2d 892, 895 (Minn. 1978), *review denied* (Minn. June 10, 1988).

Officer Glaser argues that Minnesota law prohibits the transportation of Zebra Mussels on public roads, regardless of whether they are dead or alive, and requires all boat lifts to be cleaned before they are transported to a lake.

The Administrative Law Judge recommends that the citation be affirmed. Minnesota Statutes sections 84D.05, subd. 1 and 84D.13, subd. 4(1), prohibits individuals from transporting invasive species. Under Minn. R. 6216.0250, subp. 4(B), invasive species are clearly defined to include Zebra Mussels. The statute and rules are not limited to only live Zebra Mussels. Mr. Tombers does not dispute that Zebra Mussels were present on the boat lift at the time he transported it on public roads when he removed it from Lake Minnetonka and returned it to Lake Minnetonka. As a result, the DNR made an adequate demonstration that the violation occurred. Accordingly, it is respectfully recommended that the citation and \$500 fine be **AFFIRMED**.

**A. J. C.**